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RE MOHAMAD HITAM, EX P AMFINANCE BHD

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[BANKRUPTCY NO: 29-617-2004]
B 30 NOVEMBER 2005

BANKRUPTCY: *Notice - Setting aside - Appeal against - Identity of judgment debtor - Whether stated in JD's own affidavit that he was JD in bankruptcy proceedings - Whether bankruptcy notice should have been proceeded with - Whether registrar had erred in dismissing bankruptcy notice*

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This was an appeal filed by the judgment creditor ('JC') against the decision of the registrar allowing the judgment debtor's ('JD's) application in encl. 4 and dismissing, *inter alia*, the JC's bankruptcy
D notice against the JD. The JD averred that he had been served with a bankruptcy notice based on a judgment in default ('the default judgment') obtained by the JC. The registrar's grounds of decision showed that a preliminary objection was raised for the JD that the default judgment attached to the request for the issue of
E a bankruptcy notice had stated that the JD was 'Mohamad Hitam & Rakan t/a Syarikat Bersaudara' while the bankruptcy notice cited 'Mohamad bin Hitam' as the JD. The registrar had sustained the preliminary objection pertaining to the identity of the JD and subsequently the bankruptcy notice was set aside. The issue for
F determination in this appeal was whether the JD was entitled to raise or the registrar was required to consider the issue of the identity of the JD when the JD had not relied on it as a ground in his summons in chambers or in his affidavit in support.

G **Held (allowing the appeal):**

[1] It was stated in JD's own affidavit that he was the JD in these bankruptcy proceedings. Nowhere in his affidavit did he aver to the contrary. As the registrar had come to a specific finding that the JD had never disputed the validity of the
H default judgment, the bankruptcy notice should have been proceeded with in accordance with the law and practice regulating bankruptcy proceedings. The registrar had erred in dismissing the bankruptcy notice. (pp 112 H - I & 113 A - B)

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[Setting aside the order of the registrar and reinstating the bankruptcy notice.]

Legislation referred to:
Rules of the High Court 1980, O. 32 r. 1

For the judgment debtor - Ravinathan Muthiah; M/s Ravi Muthiah & Co
For the judgment creditor - TT Leong; M/s Tunku Amiruddin & KK Chew

Reported by Suhainah Wahiduddin

JUDGMENT

Low Hop Bing J:

Appeal

This is an appeal in encl. (13) filed by the judgment creditor (JC) against the decision of the learned registrar who had on 12 May 2005 allowed with costs the judgment debtor's (JD's) application in encl. (4) and dismissed, *inter alia*, the JC's bankruptcy notice against the JD.

Factual Background

JD's application in encl. (4) was supported by his affidavit in encl. (3) in which the JD averred that on 26 October 2004, he had been served, *inter alia*, with a bankruptcy notice dated 30 August 2004 ("the bankruptcy notice") which was based on a judgment in default ("the default judgment") obtained by the JC against the JD on 14 August 1997 in Melaka Sessions Court Summons No. 52-297-1997 ("the summons").

On 27 October 2004, JD instructed his solicitors to conduct a file search in the summons. The solicitors had obtained a copy of the summons and the affidavit of service (collectively "the two documents").

Upon a perusal of the two documents, the JD was surprised that they had been served on him as he was unaware of the two documents.

JD's affidavit then referred to the judgment obtained against the guarantor. As the bankruptcy notice does not concern the guarantor, I am of the view that the averments relating to the guarantor are not relevant to the instant appeal.

JD also alleged that the bankruptcy notice against him was for the sum of RM105,616.55 based on an interest of 14.10% p.a. from the date of the default judgment to 13 August 2003.

He averred that the bankruptcy notice is wrong in law and ought to be set aside.

The learned registrar's grounds of decision show that a preliminary objection was raised for the JD in that the default judgment attached to the request for the issue of a bankruptcy notice had stated that the JD was "Mohamad Hitam & Rakan t/a Syarikat Bersaudara" while the bankruptcy notice cited "Mohamad bin Hitam" as the JD.

The learned registrar in his grounds of decision found that the JD had not disputed the validity of the default judgment. However, he sustained the preliminary objection pertaining to the identity of the JD. As a result, he set aside the bankruptcy notice.

The identity of the JD was not raised as a ground in his application in encl. (4) or in his affidavit in support in encl. (3).

Identity Of JD

Mr. Ravinathan Muthiah, learned counsel for the JD at p. 1 of his written submission, brought to my attention as follows:

> **Isu Berkenaan Pembangkitan Bantahan Awal**
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> Di sini ingin kami memberitahu mahkamah bahawa isu ini tidak pernah dibangkit atau dihujah semasa perbicaraan di hadapan Pendaftar, …

[My translation:

> **Issue Concerning the Raising of Preliminary Objection**
>
> We wish to hereby inform the court that this issue was never raised or submitted at the time of hearing before the Registrar, …]

However, he now submitted that this is a critical issue concerning the identity of the JD and that a determination thereon would dispose of the bankruptcy proceedings herein and save the time of the court.

JC's learned counsel Miss T.T. Leong relied on the JD's affidavit in support in encl. (3) wherein the JD has never denied that he was the JD in the summons. A

From the above submissions, I am of the view that the issue for determination in this appeal revolves around an important and fundamental point of practice and procedure which may be stated as follows: B

> Whether the JD is entitled to raise or the registrar is required to consider the issue of the identity of the JD when the JD has not relied on it as a ground in his summons in chambers or in his affidavit in support? C

The short answer to this issue is to be found in para 1 of the JD's own affidavit wherein he stated categorically that he is the JD in these bankruptcy proceedings. Nowhere in his affidavit did he ever aver to the contrary. D

In my view, the JD's application is regulated by O. 32 r. 1 of the Rules of the High Court 1980. Such an application must be made by way of summons in chambers in Form 62 which contains the following words: E

> The grounds of application are (state the ground).

The abovesaid words are included in Form 62 for a specific purpose. They specifically require the grounds to be stated. Form 62 is analogous to the parties' pleadings by which the parties are bound. Parties are not at liberty to go beyond the grounds other than those stated in Form 62. The judge or registrar hearing an application in Form 62 is neither required nor entitled to travel beyond the specified grounds relied on by the parties, otherwise the issues will proliferate *ad infinitum* and chaos in litigation may prevail. F G

The issue of the identity of the JD being not specified in Form 62 must not be seen to appear from nowhere, especially so when his own affidavit did categorically state that he was indeed the JD in the default judgment. H

As the learned registrar has come to a specific finding that the JD has never disputed the validity of the default judgment, the bankruptcy notice should have been proceeded with in accordance with the law and practice regulating bankruptcy proceedings. I

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Conclusion

The answer to the abovestated issue is therefore in the negative. I hold that the learned registrar has erred in dismissing the bankruptcy notice. I allow this appeal, set aside the order of the learned registrar, and reinstate the bankruptcy notice, for it to be
B proceeded with as aforesaid to its logical conclusion. Costs of this appeal to the JC.

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